Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1988

In the Matter of ROBINTECH, INC., *Debtor*

BOB BULLOCK, Comptroller of Public Accounts of the State of Texas,
Petitioner

vs.

OPPENHEIM, APPEL, DIXON & CO., *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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May 16, 1989

QUESTION PRESENTED

Subject to certain irrelevant exceptions, Bankruptcy Rule 2002(a)(8) requires that all creditors in a Chapter 11 proceeding be given not less than 20 days notice by mail of the time fixed for filing proofs of claims ("bar date") pursuant to Rule 3003(c). Rule 9006(f) provides that when there is a right or requirement to do some act within a prescribed period after service of a notice and the notice is served by mail, three days shall be added to the prescribed period.

The question presented is: If notice of a "bar date" is mailed to a creditor in a Chapter 11 bankruptcy proceeding exactly 20 days before the bar date, does Bankruptcy Rule 9006(f) serve to extend the time by three days in which the creditor may file a proof of claim.

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In The Matter Of ROBINTECH, INC., *Debtor*

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Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Bob Bullock, Comptroller of Public Accounts of the State of Texas, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on January 20, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 863 F.2d 393, and is reprinted, along with the Court's judgment and the Order denying the Petition for Rehearing, as Appendix "A".

The memorandum Opinion and Order of the United States District Court for the Northern District of Texas, Fort Worth Division (Belew, David 0. Jr.) has

not been reported to this writer's knowledge. It is reprinted as Appendix "B".

The Findings of Fact and Conclusions of Law of the Bankruptcy Court are reported at 69 B.R. 663, and are reprinted along with the Order Allowing Claim of Comptroller of Public Accounts as APPENDIX "C".

JURISDICTION

The Court of Appeals for the Fifth Circuit rendered its decision in this case on January 20, 1989. A timely Petition for Rehearing was denied on February 15, 1989, and this Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

RULES OF BANKRUPTCY PROCEDURE INVOLVED

The Bankruptcy Rules involved are Rule 2002(a), Rule 3003, and Rule 9006. Since the provisions of these rules are lengthy, their pertinent texts are set forth in Appendix "D".

STATEMENT OF THE CASE

On July 7, 1983, an involuntary Chapter 11 Petition was filed in the United States Bankruptcy Court for the Northern District of Texas, Fort Worth Division, against Robintech, Inc. ("Debtor"). On January 25, 1984, the Bankruptcy Court signed an Order which set February 14, 1984 as the date by which proofs of claims were to be filed. A copy of the Order was mailed to Petitioner Bob Bullock, Comptroller of Public Accounts of the State of Texas on January 25, 1984, and it was received by Petitioner on January 31, 1984. Petitioner filed a proof of claim for $92,742.90 in delinquent sales and use taxes on

February 16, 1984, two days past the deadline date for filing claims, which is ordinarily called the bar date. Petitioner is the state official in Texas who is responsible for the administration and collection of the Texas sales and use tax.

Respondent, Oppenheim, Appel, Dixon & Co., Bankruptcy Trustee, filed an Objection to Petitioner's Claim and Motion for Summary Judgment on Objection to the Claim on the ground that the claim was filed after the bar date. Petitioner responded that Bankruptcy Rule 9006(f) extended the deadline for filing claims by three days as a result of the mailing of the notice of bar date.

The jurisdiction of the Bankruptcy Court was invoked under 28 U.S.C. §157(b) and after a hearing on the Motion for Summary Judgment, the Bankruptcy Court entered its Findings of Fact and Conclusions of Law on February 3, 1987. The Bankruptcy Court concluded that Bankruptcy Rule 9006(f) applied to the notice of bar date at issue. Therefore, the Petitioner's proof of claim was deemed timely filed. (APPENDIX C, p. App. 23) On February 12, 1987, the Bankruptcy Court denied the Respondent's Motion for Summary Judgment and allowed Petitioner's proof of claim. (APPENDIX C, p. App. 26)

Respondent appealed the Bankruptcy Court's Order allowing the Petitioner's claim to the United States District Court for the Northern District of Texas, Fort Worth Division, and the District Court took jurisdiction under 28 U.S.C. §158.

There were three issues presented by Respondent on appeal to the District Court, but the issue the District Court found dispositive of the appeal was whether the Bankruptcy Court erred in concluding that Bankruptcy Rule 9006(f) extends the time in

which a claimant may file a proof of claim by three days beyond the bar date when the notice of the order establishing the bar date is served by mail. The District Court held since in Chapter 11 bankruptcy cases it is the mailing of the notice of bar date that triggers calculation of the 20 day notice requirement contemplated by Bankruptcy Rule 2002(a)(8), that Rule 9006(f) did apply to the mailing of Petitioner's notice pursuant to Bankruptcy Rule 2002(a)(8) and that Petitioner's proof of claim was deemed to be timely filed. (APPENDIX B, p. App. 18) The District Court then affirmed the Bankruptcy Court's ruling allowing Petitioner's proof of claim for $92,742.90 in sales and use taxes.

Invoking federal jurisdiction under 28 U.S.C. §1291, Respondent appealed the District Court's order of March 23, 1988 which affirmed the Bankruptcy Court's ruling, to the Fifth Circuit. The Court of Appeals reversed, holding that Bankruptcy Rule 9006(f) did not apply to the mailing of Petitioner's notice of bar date. (APPENDIX A, p. App. 5) In determining whether to apply Rule 9006(f), the Fifth Circuit noted that Rule 9006(f) is worded very similarly to Fed. R. Civ. P. 6(e) and concluded that Rule 9006(f) could be construed by reference to precedents interpreting Rule 6(e) and relied upon *Carr v. Veterans Administration*, 522 F.2d 1355, 1357 (5th Cir. 1975). In *Carr*, the Court held that Rule 6(e) applies only when the "prescribed period" is fixed by the date on which notice is served, and it did not apply to modify the six month period for bringing action against the United States pursuant to 28 U.S.C. §2401(b) because the prescribed period of limitations commenced with the "date of mailing" and not with the "service of a notice or other paper".

REASON FOR GRANTING THE WRIT

The decision below that Bankruptcy Rule 9006(f) does not apply to the mailing of a notice of bar date pursuant to Bankruptcy Rule 2002(a)(8) raises an important and unresolved problem regarding the construction of a federal rule of bankruptcy procedure.

In arriving at its decision in this case, the Fifth Circuit not only disregarded long-standing rules of construction, but it also relied upon the Fifth Circuit decision of *Carr v. Veterans Administration*. This case is not on point with the facts of the instant case and it is construing Fed. R. Civ. P. 6(e) instead of Bankruptcy Rule 9006(f).

The Federal Rules of Civil Procedure have the force and effect of statutes. *American Federation of Musicians v. Stein*, 213 F.2d 679 (6th Cir. 1954), *cert. denied*, 348 U.S. 873, 75 S.Ct. 108 (1954). By analogy, the Federal Rules of Bankruptcy Procedure should be construed similarly to statutes.

Under long-standing rules of statutory construction, the plain language of a statute (or in this case, rule) controls when sufficiently clear in its context. See *Ernst & Ernst v. Hockfelder*, 425 U.S. 185, 201, 96 S.Ct. 1375, 1385 (1976). As to a Federal Rule of Criminal Procedure, see *Bowman Dairy Co. v. U.S.*, 341 U.S. 214, 220, 71 S.Ct. 675, 679 (1951). "When the terms of a statute are unambiguous, judicial inquiry is complete, except in rare and exceptional circumstances." *Rubin v. United States*, 449 U.S. 424, 430, 101 S.Ct. 698, 701 (1981).

Bankruptcy Rule 2002(a)(8) requires the court clerk to give a creditor "not less that 20 days notice by mail" of the time fixed for filing proofs of claims pursuant to Rule 3003(c), which is the rule governing the filing of a proof of claim in a Chapter 11 proceeding. The language of Bankruptcy Rule 9006(f) is clear and unambiguous and reads as follows:

> (f) Additional time after service by mail. *When there is a right* or requirement *to do some act* or undertake some proceedings *within a prescribed period after service of a notice* or other paper *and the notice* or paper other than process *is served by mail, three days shall be added to the prescribed period.* (Emphasis added)

Under these rules, the Petitioner had the *right to file a proof of claim within not less than 20 days after service by mail of the notice* of bar date, therefore three days should be added to the 20 days giving the Petitioner 23 days notice by mail of the bar date. Since Petitioner's notice of bar date was mailed exactly 20 days before the bar date, Bankruptcy Rule 9006(f) should apply to afford Petitioner an additional three days beyond the established bar date to file his proof of claim.

Reading Rule 9006(f) in conjunction with Rule 2002(a)(8) does not afford every creditor in a Chapter 11 proceeding an extra three days beyond the bar date to file a proof of claim. For example, if the notice of bar date had been mailed to Petitioner 23 days or more before the bar date, Petitioner would have had to file his proof of claim on or before the bar date to be considered timely filed. Since notice by mail of the bar date is complete on mailing pursuant to Rule 9006(e), Rule 9006(f) attempts to alleviate this circumstance by offsetting the delay caused by mailing of notice with a

three-day grace period added to the bar date. Rule 9006(f) should be construed that creditors have at least twenty-three days from the date of the mailing of the notice of the bar date to file their claims, thereby allowing them at least 20 days from the date of actual notice of the bar date to file their claims.

Even though Petitioner had knowledge of the bankruptcy reorganization, he and other similar creditors, who must file large numbers of bankruptcy claims in many different proceedings with differing bar dates, should have a right that the proper, adequate and constitutional notice will be given them before their claims are forever barred. *City of New York v. New York*, N.H. & H.R. Co., 344 U.S. 293, 297, 73 S.Ct. 299, 301 (1953).

CONCLUSION

The issues of the construction of Bankruptcy Rule 9006(f) and whether Rule 9006(f) applies to Bankruptcy Rule 2002(a)(8) affects every creditor who files a proof of claim in a Chapter 11 bankruptcy proceeding. Review of the opinion below is necessary to end the confusion as to the interpretation of these rules. For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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APPENDIX A

In the Matter of ROBINTECH, INC., *Debtor*

OPPENHEIM, APPEL, DIXON & CO., *Appellant*

v.

Bob BULLOCK, Comptroller of Public Accounts of the State of Texas, *Appellee.*

No. 88-1269

United States Court of Appeals, Fifth Circuit

Jan. 20, 1989.

Appeal from the United States District Court for the Northern District of Texas

Before REAVLEY, HIGGINBOTHAM, and SMITH, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

We are called upon today to determine whether the district court properly upheld a bankruptcy court ruling permitting a creditor to file his claim after the bar date in a Chapter 11 proceeding. Concluding that the district court's decision was based upon clearly erroneous findings of fact and misapplications of law, we reverse and hold that the creditor's claim is barred.

I. *Factual and Procedural Background.*

On July 7, 1983, an involuntary petition was filed against Robintech, Inc. (the "debtor"). The order for relief was entered on July 20, 1983. The notice of the first meeting of creditors was mailed on September

23, 1983, and the first creditors' meeting was held on October 25, 1983.

The bankruptcy court signed the Order Setting Bar Date Within Which Proofs of Claim Must Be Filed ("Bar Date Order") on January 25, 1984. The Bar Date Order provided that creditors must file proofs of claim with the Clerk of the Bankruptcy Court on or before February 4, 1984, at 4:30 p.m. A copy of the Bar Date Order was sent by the debtor to each of its creditors whose name and address was set forth in the exhibit that was attached to the certificate of mailing that was filed of record on January 23, 1984. Bob Bullock, Comptroller of Public Accounts of the state of Texas ("Comptroller"), was included in that list of creditors. The notice to the Comptroller was sent by the debtor to the following address, which was listed on the exhibit to the certificate of mailing:

State Treasurer - Bob Bullock
Comptroller of Public Accounts
Capitol Station
Austin, Texas 78774

The Comptroller received the notice of the bar date on January 31, 1984, and filed his priority proof of claim in the amount of $92,742.90 on February 16, 1984, two days after the deadline established in the Bar Date Order. The bankruptcy trustee, appellant Oppenheim, Appel, Dixon, & Co. (the "trustee"), filed its objection to the Comptroller's claim on November 28, 1984, on several grounds, including that the claim was filed after the bar date. The Comptroller's answer stated that his failure to file a claim by February 14, 1984, was the result of excusable neglect and that Bankruptcy Rule 9006(f) extended the deadline for filing claims by three days as a result of the mailing of the notice of the bar date.

The trustee filed a motion for summary judgment on October 28, 1986. At the hearing of this motion, the Comptroller argued that rule 9006(f) served to extend the bar date by three days because the notice of a bar date was served by mail and that his claim should have been deemed, therefore, to have been timely filed. The Comptroller made no argument that his failure to file his claim before the bar date was the result of excusable neglect.

During that hearing, the Comptroller also asserted for the first time that there were inaccuracies in the address on the notice of the bar date that allegedly caused a delay in receipt, thereby depriving him of adequate notice of the bar date. The Comptroller alleged that the notice, as addressed, was initially received by the State Attorney General's Office, another state agency that uses the same post office address.

At the close of the hearing, the bankruptcy court requested additional evidence concerning the address used by the debtor to transmit the notice to the Comptroller. The Comptroller filed a letter memorandum on December 8, 1986, wherein his correct mailing address was alleged to be P.O. Box 13528, Capitol Station, Austin, Texas 78711. He also noted in this letter memorandum that the zip code used on the certificate of mailing is the correct one for his street address but not his post office box. Finally, the Comptroller asserted that he received the notice of bar date on January 31, 1984.

On February 3, 1987, the bankruptcy court entered its findings of fact and conclusions of law, which stated (1) that the notice of bar date had been addressed to "State Treasurer - Bob Bullock, Comptroller of Public Accounts, Capitol Station, Austin, TX 78774; (2) that the correct address was

"State Comptroller, P.O. Box 13528, Capitol Station, Austin, TX 78711"; (3) that rule 9006(f) applies in the instant case to afford the Comptroller an additional three days beyond the established bar date to file his proof of claim, since notice of the bar date was given by mail; and (4) that the Comptroller filed his claim on February 16, within the extended three-day period allegedly authorized by rule 9006(f).

Consequently, the court concluded that the Comptroller's claim was deemed to be timely filed. On February 17, 1987, the bankruptcy court denied the trustee's motion for summary judgment and allowed the claim.

On appeal to the district court, the trustee argued that rule 9006(f) does not extend the bar date by three days just because the notice of the bar date is served by mail but that the rule instead applies only in situations where personal service is the primary method of service. The trustee also contended that minor inaccuracies in the Comptroller's address did not vitiate the effect of the timely mailing of the notice thereto. The Comptroller responded, expectedly, that rule 9006(f) applies in this case to afford him an additional three days beyond the established bar date to file his proof of claim and that the notice was misaddressed, delaying receipt and impairing the Comptroller's ability to file his claim before the bar date. The district court affirmed; we now reverse.

II. *Bankruptcy Rule 9006(f)*

[1] Subject to certain irrelevant exceptions, Bankruptcy Rule 2002(a)(8) requires that "all creditors ... [be given] not less than 20 days notice by mail of ... the time fixed for filing proofs of claims pursuant to Rule 3003(c)." The advisory committee note indicates that notice by mail is effective upon mailing. Rule

3003(c)(3) provides that courts in Chapter 11 cases "for cause shown may extend the time within which proofs of claim or interest may be filed." Rule 9006(f) provides that [w]hen there is a right or requirement to do some act ... within a prescribed period after service of a notice ... and the notice ... is served by mail, three days shall be added to the prescribed period."

In determining whether to apply rule 9006(f) in this case, we note that it is worded very similarly to Fed.R.Civ.P. 6(e). In fact, the advisory committee note indicates that Rule 9006(f) "is new and is the same as Rule 6(e)F.R.Civ.P." Hence, we may construe the former rule by reference to precedents interpreting the latter.

Our own rule 6(e) precedent weighs heavily against applying rule 9006(f) to the instant case. In *Carr v. Veterans Admin.*, 522 F.2d 1355, 1357-58 (5th Cir.1975), we held that the purpose of rule 6(e) is only to guarantee that parties served personally have no advantage over those served by mail. The rule accordingly applies only when the "prescribed period" is fixed by the date on which notice is served.[1] Where, as here, all notices must be by mail, there is no need for such compensation, as all parties are theoretically subject to the same delays. Thus, *Carr* instructs that rule 9006(f) does not apply to the instant facts.

Our reliance here upon *Carr* underscores the fact that Federal Rules of Civil Procedure precedent can be helpful, in appropriate instances, in construing the new Bankruptcy Rules. This is true at least where,

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[1] For example, if some act must be done within ten days of notice and one party is served personally and another by mail under a "mail box rule," the first party would have the unfair advantage of the time it takes the letter notice to reach the second. The three-day extension functions to compensate for this possible disparity.

as here, either the bankruptcy rule itself or the accompanying advisory committee note makes reference to an analogous or seminal civil rule. Our application of rule 6(e) precedent to rule 9006(f) in this case is similar to the approach we recently followed, for example, in *In re Seiscom Delta, Inc.*, 857 F.2d 279, 281 (5th Cir.1988)(employing Fed.R.Civ.P. 58 authority in interpreting Bankruptcy Rule 9021(a)) and *In re Aguilar*, 861 F.2d 873, 874-75 & n. 2 (5th Cir. 1988) (per curiam) (noting that Bankruptcy Rules 9023 and 9024 are equivalent to, respectively, Fed.R.Civ.P. 59 and 60, except as otherwise expressly provided).

III. *Improper Address*

The trustee's brief confuses the discussion of whether it was negligent in giving notice with the issue of the adequacy of the thirteen-days' notice received by the Comptroller. These are distinct questions. The latter really concerns whether, under these facts and circumstances, the creditor should be estopped from claiming that he was harmed by defective notice.

[2] Certain findings made by the district court appear to be clearly erroneous. There is no evidence supporting the finding that the delay in receipt of notice cased the late filing. The court relied exclusively upon *In re Am. Properties, Inc.*, 30 B.R. 239 (D.Kan. 1983), which held that fifteen days' notice was insufficient where the creditor never received the notice, never filed any claim, and had no prior knowledge of the bankruptcy. However, the court in that case made specific supported findings on each of these points. Patently, that decision does not impose a bright-line fifteen-day rule.

The proper resolution rather depends upon the facts and circumstances of each particular case. Thus, to the extent that the district and bankruptcy courts

applied the fifteen-day test as a matter of law, this represents an improper legal conclusion. To the extent that they found facts indicating that a facts-and-circumstances test was met, such findings were completely conclusory.

[3] At best, the record supports a finding that the notice may have been misaddressed and that this may have caused a two-day delay in receipt. But there is no indication that any such delay in receipt caused the delay in filing. The Comptroller's brief bemoans the huge case load which he handles and the complications in preparing a claim, but most of this amounts to summary assertion. The record contains no specific evidence of causation that could support such a finding. This, even if the address were improper, this does not excuse the late filing, and we may reverse without remanding to determine whether the address was actually incorrect.

IV. *Receipt of Notice and Vitiating Effect.*

[4] A creditor's claim can be barred for untimeliness only upon a showing that it received reasonable notice. *New York v. New York, New Haven & Hartford R.R.*, 344 U.S. 293, 297, 73 S.Ct. 299, 301, 97 L.Ed.2d 333 (1953); *Am. Properties*, 30 B.R. at 245; *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 318, 70 S.Ct. 652, 657, 659, 94 L.Ed. 865 (1950). Hence, whether notice to a creditor is adequate depends upon the facts and circumstances of a given case. In general, due process requires that reasonable notice is that which is reasonably calculated to reach all interested parties, reasonably conveys all of the required information, and permits a reasonable amount of time for response. *Mullane*, 339 U.S. at 314, 318, 70 S.Ct. at 657, 659. In the instant case, evaluation of notice encompasses two distinct questions: first, whether the circumstances indicate that the creditor

actually had or should be charged with notice before receipt of the trustee's letter; and second, whether, assuming that the creditor had no adequate prior notice, the thirteen days it had, in comparison to the possible twenty, were sufficient to pass muster.

[5] The trustee's claims that the creditor had or should be charged with prior notice boil down to the assertion that a general awareness of the pending bankruptcy for several months bars any complaints as to minor failures in specific notice. Because the Comptroller should have been aware of the declaration of bankruptcy in July and the creditor's meeting in October, he had plenty of time to prepare his claim and should not now be heard to argue that he had inadequate notice.

[6] Having determined that the Comptroller at least should have been generally aware of the bankruptcy and the possibility of having to prepare a claim, we now address the efficacy of the notice actually received. The Comptroller at most lost two days in preparing his claim as a result of the possibly incorrect address. In any event, he had thirteen days out of a possible twenty. Certainly, if he had the full twenty days, he could have no complaints as to defective notice. As we have stated, there is no evidence that the two-day delay caused the late filing. If the Comptroller is to prevail on this claim, he must therefore explain, without relying upon the delay, why the full period was inadequate.

When the notice was received, the Comptroller knew that he had only thirteen days to file. An experienced creditor must be aware of the significance of bar dates. The Comptroller never asked for an extension or provided any excuse for his untimeliness

until the trustee moved for dismissal of its claim.[2] There is no evidence to support a finding that thirteen days was inadequate or unreasonable notice. The vague assertions regarding multiple cases and the difficulty of preparing a claim are no more adequate in this context than they were in proving that a possible two-day delay in receipt caused the late filing.

Moreover, the fact that the Comptroller handles a myriad of claims such as this, on behalf of the State of Texas, and that such is indeed one of the most important functions of his office, suggests that his staff should be especially proficient in filing claims to protect the public purse. Thus, inability to file claims on time, while perhaps understandable on the part of an inexperienced creditor, is hardly an excuse for this creditor.

[7] Finally, in its discussion of notice defects the bankruptcy court included allusions to general constitutional deficiencies. To the extent that these considerations affected the outcome, they were wrong as a matter of law and do not warrant substantial discussion. The cases referred to[3] consider the

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[2] The requirement for getting an extension before the bar date is strict: "In most cases, if the creditor has enough notice to seek an extension of the time for filing, enough time will exist actually to prepare and file a proof of claim. However, where time is required to liquidate the claim or where substantial investigation is required, an extension of time is appropriate." 8 *Collier on Bankruptcy* ¶ 3003.05(4) at 3003-11 (15th ed. 1988). The Comptroller also could have, but failed to, ask for an extension after the bar date passed, basen upon excusable neglect. 9 *Collier on Bankruptcy* ¶ 9006.06 at 9006-15 through 9006-18 (15th ed. 1988). As revealed in the discussion above and below, there is no indication that the Comptroller could have satisfied either of these standards if he had sought an extension.

[3] I.e. *New York v. New York, New Haven & Hartford R.R.; In re Intaco Puerto Rico, Inc.*, 494 F.2d 94, 99 (1st Cir.1974) (relying upon significance of failure to mail notices to any creditors).

adequacy of various forms of notice by publication and whether the receiving party should be charged with the awareness of such notice. Where the party actually receives a notice with only a minor delay, there can be no due process problem without a showing of harm. To say that any defect in notice here, either because of the two-day delay or the general inadequacy of the thirteen-day period where twenty days is the effective maximum, rises to constitutional dimensions presumably would call into question many existing notice systems.

The purpose of the bankruptcy laws is quickly and effectively to settle bankrupt estates. *Katchen v. Landy*, 382 U.S. 323, 328, 86 S.Ct. 467, 471-72, 15 L.Ed.2d 391 (1966). Under the Bankruptcy Code and rules, creditors play a zero-sum game in which failure to navigate effectively through various intricate procedures can mean total defeat. Moreover, because such procedures are thought to be necessary to protect the bankrupt and the creditors, exceptions cannot be made every time a creditor claims a hardship. *See In re Cleary*, 18 B.R. 114, 115 (Bankr.W.D.Pa. 1982). Frequent players in the bankruptcy arena, such as the Comptroller, know this and are aware that deadlines are important and should not be heard to complain of the unfairness except under the most egregious circumstances. To allow the late-filed claims of creditors such as the Comptroller, under the circumstances of this case, would be unfair to all of the creditors who filed on time, despite possible hardships, and whose slice of the bankruptcy pie would be smaller as a result. *See In Re Clear Fork Energy Resources, Inc.*, 44 B.R. 110, 113 (Bankr.N.D.Tex.1984). In general, it is the other diligent creditors who will be harmed by permitting late claims, not the trustee whose actions may have been a factor in the late filing.

For the aforementioned reasons, we REVERSE the district court and render judgment that the Comptroller's claim is barred.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-1269

D.C. Docket No. CA-4-87-275-K

IN THE MATTER OF: ROBINTECH, INC., *Debtor*

OPPENHEIM, APPEL, DIXON & CO.
Appellant,

versus

BOB BULLOCK, Comptroller
of Public Accounts of the
State of Texas
Appellee.

Appeal from the United States District Court
for the Northern District of Texas

Before REAVLEY, HIGGINBOTHAM, and SMITH, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is reversed, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED, that appellee pay to appellant the costs on appeal, to be taxed by the Clerk of this Court.

January 20, 1989

ISSUE AS MANDATE: February 27, 1989

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 88-1269

IN THE MATTER OF ROBINTECH, INC.,
Debtor.

OPPENHEIM, APPEL, DIXON & CO.,
Appellant,

versus

BOB BULLOCK, Comptroller of Public Accounts of the State of Texas
Appellee

Appeal from the United States District Court for the Northern District of Texas

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ON PETITION FOR REHEARING
(February 15, 1989)

Before REAVELY, HIGGINBOTHAM and SMITH, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/

United States Circuit Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS FORT WORTH DIVISION

**OPPENHEIM, APPEL,
DIXON & CO.
IN RE: ROBINTECH, INC.**

VS.

CA4-87-275-K

**BOB BULLOCK, Comptroller of
Public Accounts of the State
of Texas**

ORDER

Pending before the Court is Appellant's Appeal from the United States Bankruptcy Court for the Northern District of Texas, Fort Worth Division. Bob Bullock, as Appellee, filed a response to which Appellant filed a reply. The Court, after reviewing the parties' arguments and the record, and analyzing the holding of the Bankruptcy Court, is of the opinion that the Bankruptcy Court's holding is well-taken and shall stand.

This Court has jurisdiction pursuant to 28 U.S.C., section 158. The instant appeal is from an Order denying the Motion for Summary Judgment on Objection to Claim 658 filed by Oppenheim, Appel, Dixon & Co., trustee of the Robintech creditors' trust ("trustee"), Appellant herein. Said motion was filed on the ground that the claim of the Comptroller of Public Accounts of the State of Texas ("comptroller") was filed after the bar date and therefore should be disallowed. The bar date at issue was established by the Bankruptcy Court by Order dated January 25, 1984

and said Order set February 14, 1984 as the bar date by which proofs of claim were to be filed in the underlying bankruptcy case. Notice of that Order was mailed to the comptroller, albeit at the wrong address, on January 25, 1984 and it is undisputed that the comptroller nonetheless received it on January 31, 1984. It is also undisputed that the comptroller filed its proof of claim on February 16, 1984.

Following a November 25, 1986 hearing on the summary judgment motion before the Honorable Harold C. Abramson, United States Bankruptcy Judge, Judge Abramson issued findings of fact and conclusions of law, the essence of which are as follows. First, Judge Abramson concluded that the debtor had been negligent in misaddressing the notice of bar date and that consequently, the comptroller had not been afforded his constitutional right to adequate notice. Secondly, Judge Abramson concluded that Bankruptcy Rule 9006(f)[1] applied to the notice at issue in this case and therefore the comptroller's proof of claim was timely in any event.

Appellant states the issues on appeal as follows: (1) Did the Bankruptcy Court err in concluding that Bankruptcy Rule 9006(f) extends the time in which a claimant may file a proof of claim by three days beyond the bar date when the notice of the Order establishing the bar date is served by mail?; (2) Did the Bankruptcy

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[1]Said rule provides:

Additional Time After Service by Mail. When there is a right or requirement to do some act or undertake some proceedings within a prescribed period after service of a notice or other paper and the notice or paper other than process is served by mail, three days shall be added to the prescribed period.

Bankruptcy Rule 9006(f).

Court err in concluding that the notice of the Order establishing February 14, 1984 as the bar date was insufficiently addressed to the comptroller?; and (3) Did the Bankruptcy Court err in concluding that the comptroller's actual receipt of the notice on January 31, 1984 did not vitiate the effect of any errors in the address on the notice? As will be seen *infra*, the Court's analysis of Appellant's first argument is dispositive of the instant appeal and thus the Court need not reach Appellant's remaining arguments. Of course, this Court is bound to accept the factual findings of the Bankruptcy Court unless such findings are "clearly erroneous." *See* Bankruptcy Rule 8013; Fed.R.Civ.P. 52(a); *In re: Braniff Airways, Inc.*, 783 F.2d 1283, 1287 (5th Cir. 1986); *In re: Missionary Baptist Foundation of America*, 712 F.2d 206, 209 (5th Cir. 1983). However, conclusions of law are "fully reviewable" by this Court. *Dallas/Fort Worth Regional Airport Board v. Braniff Airways, Inc.*, 26 Bankr. 628, 630 (N.D. Tex. 1982). But, as alluded to *supra*, the Court here need only review one conclusion of law, to-wit, that Bankruptcy Rule 9006(f) serves to extend the time in which a claimant may file a proof of claim when notice of the bar date was served by mail.

In support of its contention that Rule 9006(f) should not be so applied, Appellant cites *In re Whitten*, 49 Bankr. 220 (Bankr. N.D. Ala. 1985). *Whitten* was a Chapter 13 case wherein the Bankruptcy Court held that Rule 9006(f) did not apply to extend the time to file a proof of claim in a Chapter 13 case. 49 Bankr. at 222. In so holding, the Court noted that the "Bankruptcy Rules provide no other means than by mail for the clerk to give these notices, as provided for in parts (a) and (f) of Rule 2002." *Id.* However, the Court went on to note that the time for filing a proof of claim in a Chapter 13 case is controlled by Bankruptcy Rule 3002(c) which provides that the filing must be

done "within 90 days after the first date set for the meeting of creditors ...." *Id.* at 221 (citation omitted). By contrast, the time for filing a proof of claim in a Chapter 11 case is controlled by Bankruptcy Rule 3003 in conjunction with Bankruptcy Rule 2002(a) which provides that the clerk shall give the debtor, trustee and all creditors "not less than 20 days notice by mail of ... the time fixed for filing proofs of claim pursuant to Rule 3003(c)." Bankruptcy Rule 2002(a)(8). With this in mind, the *Whitten* Court concluded that a literal reading of Rule 9006(f) shows that it does not apply to proof of claim filings in a Chapter 13 case. The Court's dispositive analysis was as follows: "The rule [9006(f)] refers to the right to do an act 'within a prescribed period after service of a notice,' when the notice is served by mail. The filing of a proof of claim [in a Chapter 13 case] is not within a *prescribed period* "after service of a notice." The filing of a proof of claim [in a Chapter 13 case] is an act within a *prescribed period* of 90 days after the first date set for the meeting of the creditors.' [In a Chapter 13 case], [i]t is the date first set for the meeting of creditors which triggers the running of time for the filing of the proofs of claim--not the mailing of the notice by the clerk of the court.'" 49 Bankr. at 222 (emphasis original).

In the instant case, Judge Abramson read *Whitten* to make Rule 9006(f) applicable to the filings of proofs of claim in Chapter 11 cases. *See* Findings of Fact and Conclusions of Law at 5 n.l. This Court agrees. In this Court's opinion, in Chapter 11 cases, it is the mailing of the notice that triggers calculation of the 20 day notice requirement contemplated by Rule 2002(a). *See* Advisory Committee Note to Rule 2002 (notice by mail is complete upon mailing). That being the case, and their being no explicit or implied exceptions in the rules, the Court holds that Rule 9006(f) does indeed apply to the mailing of a notice

pursuant to Rule 2002(a)(8). The comptroller's proof of claim, therefore, was timely filed.

For the foregoing reasons, the Bankruptcy Court's February 3, 1987 ruling allowing the comptroller's Claim 658 should be and hereby is AFFIRMED.

IT IS SO ORDERED.

SIGNED this 23rd day of March, 1988.

/s/

DAVID 0. BELEW, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF TEXAS FT. WORTH DIVISION

IN RE:
ROBINTECH. INC. **CASE NO. 483-00558-11**

D E B T 0 R

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On January 24, 1984, the United States Bankruptcy Court for the Northern District of Texas, Ft. Worth Division, entered an order establishing February 14, 1984 as the bar date in which proofs of claim must have been filed in this case. Notice of that order was sent to the Comptroller of Public Accounts of the State of Texas ("the Comptroller"), on January 25, 1984. The notice was addressed, however, to

State Treasurer - Bob Bullock
Comptroller of Public Accounts
Capitol Station
Austin, Texas 78774.

The correct address was

State Comptroller
P. 0. Box 13528
Capital Station
Austin, Texas 78711.

The Comptroller received the notice, via other state offices, on January 31, 1984. The Comptroller did not file its proof of claim until February 16, 1984, two days after the bar date. The Trustee filed its objection to the claim and a motion for summary judgment on the ground that the claim was filed after the bar date.

Bankruptcy Rule 9006(e) states that "[s]ervice of process and service of any paper other than process or of notice by mail is complete on mailing." Thus once an item is placed in the mail, notice is considered complete. When mail is properly addressed, stamped and deposited, there is a rebutable presumption that it was received by the party to whom it was sent. Proper mailing, however, must be proved before the presumption is activated. *In re American Properties*, Inc., 30 B.R. 239, 243-44 (Bankr. D. Kan. 1983). If the proper and correct address was not used, the presumption cannot be activated. *Id.* at 244. Standards of correctness vary with the nature of the entity, private or public, and a less definite and more general address may be sufficient for a well known public entity. *Id.* Where an address is only slightly incorrect, as it was held to be in the *American Properties* case, the presumption is weakened, but still raised. Denial of receipt does not, as a matter of law, rebut the presumption, but rather creates a question of fact. *Id.*

The question of improper mailing in the case at bar is mentioned by the court in order to exemplify the importance of a proper address used by a Debtor or Trustee, in order to safeguard the rights of parties receiving such notice; also the purpose of this discussion is to exemplify the importance of a party receiving the notice to seek an extension of time in order to preserve its rights.

In a Chapter 11 case, the court has the power to set the time for filing of proofs of claim. Bankruptcy

Rule 3003(c) (3). Under Rule 2002(a)(8), notice of a bar date may be given not less than twenty days prior to the time set.

In the instant case, the order setting bar date was signed and notice of bar date mailed on January 25, 1984, exactly twenty days before the bar date of February 14, 1984. In the normal course of mail, the Comptroller should have received notice by at least January 27 or 28, giving the Comptroller 17 or 18 days to respond. This time was shortened by the fact that claims are not considered filed until actually received by the clerk and filed. Thus, the Comptroller would had to have mailed it *before* the actual bar date in order to ensure receipt and filing by February 14, 1984. Again. the time to file was further shortened by the debtor's failure to correctly address the notice. Due to this error, the Comptroller did not receive the notice until January 31, 1984. All factors considered, if the Comptroller had been able to use Express Mail for overnight delivery on the 13th, the Comptroller had a maximum of thirteen to fourteen days to file its claim, without an extension or the application of Rule 9006(f), discussed *infra*.

In *In re American Properties*, 30 B.R. 239 (Bankr. D. Kan. 1983), similar facts occurred with similar consequences. *See also* related cases, *In re American Properties (Board of County Commissioners of Johnson County, Kansas v. Coleman American Properties, Inc.)*, 30 B.R. 235 (Bankr. D. Kan. 1983), and *Board of County Commissioners of Sedgwick County, Kansas v. Coleman American Properties*, 30 B.R. 247 (Bankr. D. Kan. 1983). The court in that case had ordered a bar date of September 9, 1980 on August 22, 1980, a time limit of eighteen days. The misaddressed notice was held to have reached the county tax creditor eventually, even though it denied receipt. However, the court held that fifteen days was

too short a time period for allowing claims to be filed, and thus the notice was constitutionally insufficient to forever bar the county's claim. *Id.* at 245.

In the instant case, due to the debtor's negligence in misaddressing the notice, the Comptroller had less than fourteen days in which to file its claim. A creditor has the right to assume that proper, adequate and constitutional notice will be provided before its claim is forever barred. *American Properties*, 30 B.R. at 245 citing *New York v. New York, N.H. & Hartford R.R.*, 344 U.S. 293, 297, 73 S. Ct. 299, 301, 97 L. Ed. 333 (1953); *In re Intaco Puerto Rico, Inc.*, 494 F. 2d 94, 99 (lst Cir. 1974). The Comptroller here was not afforded this protection.

Rule 9006(f) provides that if notice is sent by mail to do some act or undertake some proceedings within a prescribed period, then three days shall be added to the prescribed period to allow for mailing. The Trustee argues that the additional three days to allow for mailing granted by Bankruptcy Rule 9006(f) is inapplicable here because creditors were given a deadline on or before which they were to file claims rather than a requisite number of days within which to file a claim.[1] The court does not recognize this distinction, and holds that 9006(f) applies in the instant case to afford the Comptroller an additional three days beyond the bar date to file its proof of claim. Since the Comptroller filed its claim on February 16, within the three days added by 9006(f), its claim was timely filed and should be allowed.

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[1]The case of *In re Whitten*, 49 B.R. 220 (Bankr. N.D. Ala. 1985), cited by the Trustee in support of this proposition, is improper precedent for the Chapter 11 case at bar. Whitten is a Chapter 13 case and specifically makes applicable Rule 9006(f) to Chapter 9 and Chapter 11 cases.

The Trustee also argues that allowing a claim to be filed after the bar date would be inequitable and prejudicial to the debtor and other creditors who complied with and acted in reliance on the bar date, by dissipating the pool of funds available for distribution. The equities in this case are difficult to balance. On the one hand, the Debtor's negligent actions impaired the Comptroller's ability to file a timely claim. On the other hand, although the Comptroller had insufficient time to file its claim before the bar date, it also took no action to seek an extension of such time. Rule 3003(c)(3) allows the court to extend the time for filing for good cause shown, which, in this case, could have been found in the incorrect address and delayed notice. Although the allowance of this claim will further dissipate the funds available to other creditors, the Comptroller's claim was timely filed and thus it is not inequitable to allow it.

The Trustee's motion is accordingly denied, and the Comptroller's claim hereby allowed, and the Attorney General of Texas is directed to prepare an appropriate order.

Signed this 2nd day of February, 1987.

/s/

United States Bankruptcy Judge

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FT. WORTH DIVISION

IN RE

ROBINTECH, INC. **CASE NO. 483-00558-11**

D E B T 0 R

ORDER ALLOWING CLAIM OF COMPTROLLER OF PUBLIC ACCOUNTS

On the 25th day of November, 1986 came on to be heard the Motion for Summary Judgment filed by the Trustee in the above-referenced proceeding and said Trustee's Objection to the claim of the Texas Comptroller of Public Accounts; and the Court, having heard the evidence and arguments of counsel, finds that the time allowed for filing of claims due to the improper mailing of the notice of bar date was constitutionally insufficient to bar the Comptroller's claim. The court further finds that Rule 9006(f) applies in this case to afford the Comptroller an additional three days beyound the bar date to file its proof of claim and that the Comptroller did file his claim within the three additional days. It is therefore

ORDERED, ADJUDGED and DECREED that the Trustee's Motion for Summary Judgment is denied and that the Comptroller's claim is hereby allowed.

Signed this 12th day of February, 1987.

/s/
Harold C. Abramson, United States Bankruptcy Judge

APPENDIX D

Applicable Bankruptcy Rules

Rule 2002(a)(8) [in pertinent part]

(a) *Twenty-Day Notices to Parties in Interest.* Except as provided in subdivisions (h), (i) and (k) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees not less than 20 days notice by mail of

...

(8) the time fixed for filing proofs of claims pursuant to Rule 3003(c).

Rule 3003(a) and (c) (3)[in pertinent part]

(a) *Applicability of Rule.* This rule applies in chapter 9 and 11 cases.

...

(c) *Filing Proof of Claim.*

...

(3) *Time for Filing.* The court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed.

Rule 9006(e) and (f) [in pertinent part]

(e) *Time of Service.* Service of process and service of any paper other than process or of notice by mail is complete on mailing.

(f) *Additional Time After Service by Mail.* When there is a right or requirement to do some act or undertake some proceedings within a prescribed period after service of a notice or other paper and the notice or paper other than process is served by mail, three days shall be added to the prescribed period.